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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 138

BERTIE PETTIT,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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Of Counsel.

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PETITION.

To the Honorable the Supreme Court of the United States:

Comes now Bertie Pettit, hereinafter styled petitioner, and, applying for writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit, respectfully shows:

Statement of the Case.

This petition is companion to petition No. 137, Charles Pettit *v.* Commissioner of Internal Revenue. Petitioner and Charles Pettit are and were during all the years involved husband and wife and citizens and residents of the State of Texas. They filed separate income tax returns with the Collector for the Second District of Texas. All of their income and all allowable deductions for the years involved are community income and deductions (R. 48).

The case involves the applicability of the capital gains provisions [1] of the Revenue Acts of 1934 and 1936 to the proceeds of the sales of certain crude oil received by petitioner during the years 1934, 1935 and 1936 (R. 46 & 47). Petitioner claims the provisions apply (R. 54); the Commissioner denies that they do (R. 55).

Prior to the years involved, petitioner's husband acquired, by investment (B. T. A. Syllabus, R. 45), thirty-one so-called oil payment contracts. (Copies of the contracts were introduced before the Board as Exhibits 1 to 31, inclusive (R. 48), and each contained a particular description of the lands in the East Texas Oil Field under which the particular oil lay.) In these proceedings some of these contracts are referred to as barrel contracts, and the others as dollar contracts. Under eight of the barrel contracts, her husband's vendors granted, sold and conveyed to him and agreed to deliver if, as and when produced, a definite number of barrels of merchantable pipe

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[1] Section 117. *Capital Gains and Losses.*

(a) *General Rule.*—In the case of a taxpayer, other than a corporation, only the following percentages of the gain or loss recognized upon the sale or exchange of a capital asset shall be taken into account in computing net income:

100 per centum if the capital asset has been held for not more than one year;

80 per centum if the capital asset has been held for more than one year but not more than two years;

60 per centum if the capital asset has been held for more than two years but not more than five years;

40 per centum if the capital asset has been held for more than five years but not more than ten years;

30 per centum if the capital asset has been held for more than ten years.

(b) *Definition of Capital Assets.*—For the purposes of this title "capital assets" means property held by the taxpayer (whether or not connected with his trade or business), but does not include stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business.

line crude oil from a specified fractional part of the total production from the specified premises. In the case of the other barrel contract, petitioner and her husband in 1931 sold their interest in an oil lease for $5,000.00 in cash and reserved 210,000 barrels of oil in place (R. 49). Five of the dollar contracts were acquired by the husband from the owners of the working interests (*i. e.*, the lessees) of certain oil and gas leases, and those owners sold and conveyed to him the proceeds from the sale of certain specified fractional parts of the oil and gas in and under and which should be produced, saved and sold from the specified premises until he had received a certain fixed sum of money from the sale of the oil. In eleven of the dollar contracts, he purchased or otherwise acquired from others their interests, or a portion of their interests, in various oil payment contracts (R. 48). In two of the dollar contracts, petitioner and her husband had been the owner or part owner of leases and had assigned them, retaining the right to receive a certain sum of money from a specified fraction of the oil produced and saved from the leases (R. 49).

All of the contracts are alike in that there is no personal obligation to pay the Pettits the specified number of barrels of oil or amounts of money out of oil, and they must look to the oil and to the oil only for the return of their capital investment (R. 49).

Each of the contracts contained provisions similar to the following:

> "for and in consideration of the sum of $10.00 and other good and valuable consideration * * * granted, sold and conveyed and hereby agrees to deliver unto the buyer if, as and when produced and saved from the aforesaid tracts of land (the specified number of) barrels of merchantable pipe line crude oil" etc.

> "This conveyance is intended to have all the effect of a deed to the said oil hereby conveyed to the buyer out of (specified fraction) of all of the oil produced and saved from the aforesaid lease herein provided, and any pipe line company or other purchasers of oil from said lease shall so treat this agreement and it shall not be necessary for the seller to execute to the buyer any further conveyance or other instruments to enable the buyer to receive full performance hereof" (R. 49).

though not all used the identical language (R. 50). Neither party contends that there are any differences in substance in this respect in the several contracts and conveyances (R. 50).

The leasehold estates to which these contracts were applicable were developed without cost to the Pettits and they had nothing whatever to do with and paid no part of the cost of drilling the wells or the production of the oil (R. 51). The operators of the various leases arranged with pipe line companies to purchase and run the oil, and petitioner's husband in each instance executed what is known in the oil industry as a "division order" to the purchasing pipe line company (R. 51). At the time of the Board's decision, the wells out of which the Pettit's oil was produced were permitted to produce oil five days a week, with a maximum production of twenty-two and a fraction barrels a day. Under the restriction in force at the time, from three to thirty years would be required for them to receive the number of barrels of oil or the number of dollars out of oil to which they were entitled (R. 51). The oil produced is accumulated in storage tanks and at irregular intervals, depending upon the amount of storage, the oil is run from the tanks into the pipe lines belonging to the purchasing companies. Pettit and petitioner have nothing to do with the running of the oil. The pipe line companies purchasing

the oil pay them once a month for the amount they are entitled to receive (R. 53).

The Commissioner allowed petitioner to deduct from this income, cost depletion or the statutory percentage depletion (27½%), whichever was greater (R. 55). He held that the balance was taxable as ordinary income, wherefore, he determined the following deficiencies against petitioner:

1934	$4,552.98
1935	2,316.07
1936	5,523.44

(R. 46). Petitioner agreed that she was entitled to the depletion allowances, but insisted that the sales of her oil were sales of capital assets within the meaning of Section 117 and that she was entitled to use the applicable percentages of the section in computing the income (R. 54), which would result in refunds and not deficiencies (R. 47).

The Pettit's books were kept and their returns rendered on a basis of cash receipts and disbursements (R. 48).

Statement as to Jurisdiction.

The Board of Tax Appeals agreed with the Commissioner (R. 60), and on March 22, 1941, the Circuit Court of Appeals for the Fifth Circuit affirmed the Board's decision (R. 76). Jurisdiction of this case is conferred upon the Supreme Court by I. R. C., Section 1141(a) and 28 U. S. C. A., Section 347. The opinion of the Circuit Court of Appeals is set out at page 73 of the record.

Questions Presented.

Was the income in question gain from the sale or exchange of capital assets within the definitions of the Revenue Acts of 1934 and 1936, or was it ordinary income? To put the question generally: Does the owner of definite quan-

tities of oil in place in the earth, acquired by purchase as an investment through so-called oil payment contracts, which vested him with present title and made provision for the future delivery of the oil above ground, and who receives the proceeds from the sale of the oil after it is lifted from the earth, but has nothing to do with the lifting, receive ordinary income, or gain from the sale of capital assets, under the capital gains provisions of the Revenue Acts of 1934 and 1936?

Reasons Relied on for Allowance of Writ.

1.

In deciding that the proceeds received by one as the owner of an oil payment contract, which he had acquired by investment, from the sales of his oil after it is lifted from the earth, must take the basis of ordinary income and cannot be treated as a gain from the sale or exchange of capital assets, the Circuit Court of Appeals resolved, in favor of the Commissioner of Internal Revenue, an important question of Federal income tax law which has never been but ought to be settled by this Court. Petitioner urges that the question is of such importance to the large class of persons who invest their money in oil payment contracts as to merit consideration by the Supreme Court.

2.

The Circuit Court of Appeals held that the decision in this case was ruled by *Burnet* v. *Harmel,* 287 U. S. 103, 77 L. Ed. 199, and *Anderson* v. *Helvering,* 310 U. S. 404, 84 L. Ed. 1277, but petitioner, with all deference, urges that it cannot be so. The present issue was not before the court in those cases and therefore could not have been decided. Nor are general expressions in those opinions conclusive here. Because the consideration of the present issue by the

court below was circumscribed by what it erroneously deemed to be the binding force of those cases and because of the importance of a settlement of the question, the Supreme Court should take jurisdiction.

3.

The Circuit Court of Appeals, in deciding that the income in controversy was derived from a "working of the wells" and was not proceeds from a sale or exchange of property, has restricted the meaning of the words "sale" and "exchange" as used in Section 117 (a) of the Revenue Acts of 1934 and 1936 to an extent never contemplated by the Congress and contrary to the plain meaning as disclosed by the section.

Wherefore, petitioner prays that a writ of certiorari issue to the Honorable United States Circuit Court of Appeals for the Fifth Circuit, commanding it to certify to the Supreme Court, for its review and determination on a day certain, a full and complete transcript of the record and proceedings in the cause numbered and entitled on its docket, No. 9587, *Bertie Pettit* v. *Commissioner of Internal Revenue,* and that the judgments of the Circuit Court of Appeals and of the Board of Tax Appeals be reversed; and that petitioner have such other and further relief in the premises as this Court may deem proper.

Respectfully submitted,

W. B. HARRELL,
Attorney for Petitioner.

RUSSELL ALLEN,
Of Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 138

BERTIE PETTIT,

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COMMISSIONER OF INTERNAL REVENUE,

Respondent.

SUPPORTING BRIEF.

This petition is companion to petition No. 137, *Charles Pettit* v. *Commissioner of Internal Revenue,* and was filed at the same time. The issues in the cases are identical (see joint motion to consolidate, R. 71). For the sake of brevity, the supporting brief attached to the petition of Charles Pettit is not copied here but is adopted in support of this petition.